IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CHARLES WAYNE MARIETTA, Appellant.	)	2 CA-CR 2005-0398 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20040962

Honorable Hector Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Diane Leigh Hunt
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P E L A N D E R, Chief Judge.

¶1 After a jury trial, appellant Charles Wayne Marietta was convicted of sexual conduct with a minor and attempted sexual conduct with a minor in violation of A.R.S. § 13-1405. The trial court sentenced him to a presumptive prison term of twenty years on the sexual conduct conviction, to be followed by lifetime probation on the attempted sexual conduct conviction. On appeal, Marietta raises six issues, none of which merits reversal. Accordingly, we affirm.

BACKGROUND

¶2 "We view the evidence and all reasonable inferences therefrom in the light most favorable to sustaining the jury's verdicts." *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). Marietta married Irena T.'s mother when Irena was seven or eight years old. When Irena was nine years old and alone with Marietta in the home, he told her "to take off [her] pants and [her] underwear" and then "performed oral sex on [her]." Later, when Irena was eleven, Marietta entered her bedroom, unzipped his pants, "grabbed [Irena's] hand," and "put it on his penis."

¶3 At age fourteen, while visiting her uncle in California, Irena disclosed the abuse to her uncle's girlfriend, Chris. Irena testified that she had not initially reported the abuse because she "was scared" that her mother "wouldn't believe [her]" or that her biological father "might do something that he shouldn't." After Irena told Chris about the abuse, Chris told Irena's uncle, who then told Irena's mother, Carolyn Marietta. Carolyn

contacted the police, and Irena recounted her abuse to Pima County Sheriff's Detective William Knuth.

DISCUSSION

I. Expert testimony

¶4 Marietta first argues he was denied "his due process right to a fair trial" because the state's expert witness, Wendy Dutton, "improperly testified that the alleged victim['s] . . . testimony was reliable." "We review the trial court's ruling on expert testimony for a clear abuse of discretion." *State v. Hyde*, 186 Ariz. 252, 276, 921 P.2d 655, 679 (1996). "However, when the admissibility of expert opinion evidence is a question of 'law or logic,' it is this court's responsibility to determine admissibility." *State v. Moran*, 151 Ariz. 378, 381, 728 P.2d 248, 251 (1986), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶5 We first address the state's contention that Marietta "forfeited any challenge to Dutton's expert testimony." Before trial, Marietta moved in limine to preclude, or alternatively to limit, testimony by Dutton—"a licensed professional counselor and forensic interviewer at the Child Abuse Assessment Center at St. Joseph's Hospital in Phoenix." Marietta argued, inter alia, "Arizona law prohibits an expert witness from rendering an opinion as to the victim's credibility." Despite that motion, the state argues Marietta "failed to obtain a ruling on the admissibility of the expert testimony to which he now objects" and "failed to contemporaneously object to any of Dutton's expert testimony on the stand,"

thereby forfeiting his argument about Dutton's trial testimony. Although Marietta's pretrial motion barely preserved the issue, we find no forfeiture here.

¶6 In determining whether a pretrial motion preserves an issue for appeal, "'[t]he essential question is whether or not the objectionable matter is brought to the attention of the trial court.'" *State v. Coleman*, 122 Ariz. 99, 101, 593 P.2d 653, 655 (1979), *quoting State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975). Accordingly, "'[a] properly made motion in limine will preserve appellant's objection on appeal without need for further objection if it contains specific grounds for the objection.'" *Id.*, *quoting Briggs*, 112 Ariz. at 382, 542 P.2d at 807; *but see State v. Tovar*, 128 Ariz. 551, 554, 627 P.2d 702, 705 (App. 1980) (when motion in limine only generally addresses "statements of law which may or may not be applicable to the trial," "specific objections to the evidence were required in order to alert the trial court to an evidentiary problem."). As mentioned, Marietta's motion in limine specifically, albeit minimally, addressed the current issue on appeal. And the record shows the issue was squarely before, and at least implicitly ruled on by, the trial court.

¶7 Several months before trial, during the initial hearing on Marietta's motion, the prosecutor acknowledged that "we're all sort of in agreement as to the general characteristics of victims and offenders[;] we can . . . put on expert testimony[;] we just can't talk about the specific instance[s] of credibility or specifics of this case." Similarly, at a status conference held shortly before trial, the prosecutor said, "[W]e're both well aware of

the parameters within which [the expert] witnesses will be allowed to testify." The trial court then stated there would be no testimony "about the credibility, reliability or accuracy or inaccuracy of any witnesses." The prosecutor replied, "That's correct."

¶8 The minute entry of that status conference merely stated the trial court withheld ruling "[a]s to [the] motion re[garding] Wendy Dutton's testimony." But it is possible, if not likely, that statement referred to Marietta's additional argument in his motion in which he sought to exclude any testimony by Dutton about offender profiles. In any event, in view of the trial court's express ruling on the record at the status conference itself and the prosecutor's agreement to not introduce any expert opinions on the credibility of witnesses, we find the issue was not forfeited but was preserved for appeal. Therefore, we turn to the merits of Marietta's argument.

¶9 Marietta contends Dutton's testimony exceeded the bounds of permissible expert testimony. Expert testimony is admissible when "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702, 17A A.R.S. In light of that rule, our supreme court has recognized that expert testimony about the general "behavioral characteristics" of sexual abuse victims may "aid the jury in weighing the testimony of the alleged child victim." *State v. Lindsey*, 149 Ariz. 472, 473-74, 720 P.2d 73, 74-75 (1986); *see also Moran*, 151 Ariz. at 381, 728 P.2d at 251 ("*Lindsey* recognized that expert testimony on recantation and other problems afflicting sexual abuse victims may explain a victim's seemingly inconsistent

behavior and aid jurors in evaluating the victim's credibility."). In *Lindsey*, the court further articulated that certain types of expert opinion evidence would not assist the jury and, therefore, are inadmissible under Rule 702, noting:

> [E]xperts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried. Nor should such experts be allowed to give opinions with respect to the accuracy, reliability or truthfulness of witnesses of the type under consideration. Nor should experts be allowed to give similar opinion testimony, such as their belief of guilt or innocence. The law does not permit expert testimony on how the jury should decide the case.

149 Ariz. at 475, 720 P.2d at 76.

¶10 Marietta argues Dutton's testimony "went beyond testifying about proper interview techniques and the behavioral characteristic[s] of child abuse victims." Specifically, he points to Dutton's testimony on direct examination that "most children, by the time they reach adolescence, know the difference between a truth and a lie" and her discussion about children's memories generally being more accurate when recounting "autobiographical salient" facts as opposed to memorizing lists, culminating in her testifying that "[c]hildren's memory is quite good, in the manner in which children disclose or initially report their being victims of sexual abuse." Although arguably borderline, that testimony was not clearly inadmissible and did not amount to improper expert opinion that "Irena . . . was [a] reliable" witness, as Marietta asserts.

¶11 In *State v. Jackson*, 170 Ariz. 89, 92, 821 P.2d 1374, 1377 (App. 1991), the state's expert testified, inter alia: "I think it's very hard for a 10 year-old to maintain a lie

over a long period of time, . . . with the pressure from adults and authority figures." Applying *Lindsey*'s principles, this court concluded that such testimony did not amount to "direct comments about the victim's credibility[;] rather, they were comments about several characteristics of victims of child sexual abuse generally." *Id*. Similarly, that is the case here. Unlike the egregious situation in *Lindsey*—in which the expert testified the "likelihood [wa]s very strong" that the specific victim's testimony was consistent—here, Dutton merely explained that children generally remember autobiographical events more than random lists and that they know the difference between the truth and a lie. 149 Ariz. at 477, 720 P.2d at 78. She did not testify that Irena had a good memory, was telling the truth, or had testified in a manner consistent with other victims of sexual abuse. *Cf. Moran*, 151 Ariz. at 384-86, 728 P.2d at 254-56 (expert's opinion that victim had been truthful in her allegations of molestation went to "credibility of a particular witness" and thus amounted to prejudicial error); *State v. Tucker*, 165 Ariz. 340, 346, 798 P.2d 1349, 1355 (App. 1990) (prejudicial error found when expert had "express[ed] an opinion about the veracity of the child [victim]").

¶12 We acknowledge, however, that Dutton's challenged testimony arguably is close to the type of expert opinion evidence disallowed in *Lindsey*. But, again, *Lindsey* presented a much more extreme and obvious situation of improper expert opinion than what Marietta challenges here. The expert in *Lindsey* also testified that research suggested only "one percent [of victims] lied." 149 Ariz. at 476, 720 P.2d at 77. Our supreme court noted

that "[q]uantification of the percentage of witnesses who tell the truth" "—which falls short of an opinion about the specific witness before the jury—might not be prejudicial error." *Id.* at 476-77, 720 P.2d at 77-78. Here, Dutton's testimony did not go so far as quantifying the percentage of truthful victims.

¶13 Marietta also contends it was "improper" when Dutton testified that "forensic interviews . . . provide structure for children to provide . . . as much accurate information as possible." That testimony, he argues, suggested that, because Irena had been properly interviewed, her "testimony [wa]s likely to be truthful." But, because "most jurors are likely to be unfamiliar with the behavioral sciences . . . [and] do not necessarily possess the experience to determine what constitutes proper questioning," "'the fact that limited expert testimony regarding proper interview techniques indirectly involves the child's credibility does not render it inadmissible.'" *State v. Speers*, 209 Ariz. 125, ¶¶ 24, 23, 98 P.3d 560, 566 (App. 2004), *quoting Barlow v. State*, 507 S.E.2d 416, 418 (Ga. 1998). Accordingly, this portion of Dutton's testimony was not improper.[1]

¶14 Marietta also argues Dutton improperly testified on redirect examination "that she would not expect[] a 15 year old to make false reports after a divorce because it was no longer necessary to remove the person, that if the [victim] does not need to cover up a consensual relationship, it is unlikely that [the victim] would make a false allegation, and

[1]We also note that Marietta concedes that "[e]xpert testimony concerning interview techniques is permissible."

that she would not expect a false allegation in the absence of mental illness." As the state points out and Marietta concedes, however, that testimony was elicited without objection after Marietta's counsel asked Dutton to provide "the motive behind false allegations." As the state also points out, "[p]rosecutorial comments which are a fair rebuttal to areas opened by the defense are proper." *State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985). Thus, we agree with the state that, because Marietta initiated questioning on the topic of false allegations, he cannot claim error when the state "merely confirm[ed]" Dutton's testimony and when "Dutton did not materially expand upon the testimony that [Marietta] had elicited." In sum, admission of Dutton's challenged testimony did not clearly violate the trial court's in limine ruling or otherwise amount to error justifying reversal.

II. Motion for change of judge

¶15 Marietta next argues he was "denied his constitutional right to an impartial judge" because "[t]he trial court erroneously denied [his] motion to disqualify the judges of the Pima County Superior Court" although "the alleged victim's mother was a probation officer and therefore an employee of the Pima County Superior Court." "We review a trial court's ruling on claims of judicial bias for an abuse of discretion." *State v. Ramsey*, 211 Ariz. 529, ¶ 37, 124 P.3d 756, 768 (App. 2005).

¶16 Before trial, pursuant to Rule 10.1, Ariz. R. Crim. P., 16A A.R.S.,[2] Marietta filed a "[m]otion for a change of judge and change of venue." After a hearing on the motion, a designated Santa Cruz County Superior Court judge (J. Soto) denied the requests. Marietta then filed a special action petition from that ruling in this court, and we declined jurisdiction. Marietta's petition for review to our supreme court was also denied. During a status conference held after voir dire had begun, Marietta renewed his motion. The trial judge stated he did not know Irena's mother and had had "no contact with her." Marietta now argues issues during trial "ar[o]se that called the trial judge's impartiality into question."

¶17 As the party claiming judicial bias, Marietta must overcome the "strong presumption" that trial judges are fair and impartial. *State v. Cropper*, 205 Ariz. 181, ¶ 22, 68 P.3d 407, 411 (2003); *see also State v. Medina*, 193 Ariz. 504, ¶ 11, 975 P.2d 94, 100 (1999). "Overcoming this burden means proving 'a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants.'" *Cropper*, 205 Ariz. 181, ¶ 22, 68 P.3d at 411, *quoting In re Guardianship of Styer*, 24 Ariz. App. 148, 151, 536 P.2d

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[2]That rule provides:

> In any criminal case prior to the commencement of a hearing or trial the state or any defendant shall be entitled to a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge.

Ariz. R. Crim. P. 10.1(a).

717, 720 (1975). This requires the moving party to "set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge [wa]s biased or prejudiced." *Medina*, 193 Ariz. 504, ¶ 11, 975 P.2d at 100.

¶18 Marietta claims that because Carolyn Marietta, as an adult probation officer in Pima County, was an employee of the superior court,[3] the entire Pima County Superior Court bench was biased in her favor. He asserts that Carolyn's relationship with the court forced the judges to "face[] . . . a case in which one of their own employees suffered."[4] But, as Judge Soto noted in denying Marietta's motion, Carolyn's position as a court employee is not enough, by itself, to overcome the presumption of impartiality.

¶19 Our supreme court addressed this issue in *State v. Smith*, 203 Ariz. 75, 50 P.3d 825 (2002). There, a defendant attempted to disqualify the entire bench of the Yuma County Superior Court from imposing his sentence because the murder victim's son and daughter-in-law were both "longtime employees of the Yuma County Superior Court." *Id.* ¶¶ 8-10. In addition to that fact, the sentencing judge in *Smith* admitted that he had "had

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[3]*See* A.R.S. § 12-251(A) ("The presiding judge of the superior court in each county shall appoint a chief adult probation officer who shall serve at the pleasure of the presiding judge."); *State v. Pima County Adult Probation Dep't*, 147 Ariz. 146, 148, 708 P.2d 1337, 1339 (App. 1985) ("[P]robation officers are part of the judicial department.").

[4]In a related argument, citing A.R.S. § 13-4403(C), Marietta states that, as Irena's mother, Carolyn could have exercised the rights of Irena, and "[t]hus the trial court faced the possibility of ruling on any rights asserted by [Carolyn]." But, that the trial court might have had to rule on Carolyn's rights as a representative in no way shows *actual* bias. *See State v. Medina*, 193 Ariz. 504, ¶ 11, 975 P.2d 94, 100 (1999). Thus, this argument is without merit.

some professional contact with [the son and daughter-in-law] in the past." *Id.* ¶ 8. Still, our supreme court found no "actual bias" and concluded that the defendant "did not meet his burden of proof under Rule 10.1." *Id.* ¶ 13. The court also analyzed whether the facts created "the appearance of impropriety" under Canon 2 of the Code of Judicial Conduct, Ariz. R. Sup. Ct. 81, 17A A.R.S., and concluded that the judges' "attenuated relationship" with the victim's children "did not require . . . disqualification" under the Code. 203 Ariz. 75, ¶ 19, 50 P.3d at 830.

¶20 Similarly, here, Marietta failed to establish that Carolyn's employment position created actual bias or even the appearance of impropriety. As the state points out, Marietta's trial judge "denied ever having worked with or even knowing the victim's mother." Thus, the relationship at issue is even more attenuated than that presented in *Smith*. And, as the state also points out, Marietta "never alleged below that [his trial judge] was personally biased—moving only to disqualify the entire bench as a matter of law." We further note that, prior to sentencing, Marietta thanked the trial judge for his impartial handling of the trial.

¶21 Still, Marietta tries to distinguish *Smith*, arguing that actual bias—exhibited by the trial court's use of leading questions during voir dire to rehabilitate two jurors—existed in his case.[5] But the bias and prejudice necessary to disqualify a judge must

[5]Marietta separately argues the trial court erroneously rehabilitated those jurors, the merits of which we address in more detail below.

arise from an "extra-judicial source and not from what the judge has done in his participation in the case." *Smith v. Smith*, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977); *see also State v. Hill*, 174 Ariz. 313, 324, 848 P.2d 1375, 1386 (1993) ("[T]here is a great deal of difference between ruling on questions of law and demonstrating bias and prejudice."). Accordingly, we cannot say Judge Soto abused his discretion in finding that Marietta had "failed to show by a preponderance of the evidence that a fair and impartial trial [could] not be had . . . with one of the judges from the bench in Pima County" and that Marietta had "failed to show any actual bias or interest by the assigned judge in []his case."

III. Prior consistent statements

¶22 Marietta next argues the trial court erroneously admitted "[t]estimony by [Irena's] friends . . . that she had spoken to them about some unidentified issue involving her stepfather." Irena testified without objection that she had told two middle school friends—Lindsey and Steve—about "the things that [Marietta] had done." Before those two witnesses testified, Marietta argued "the substance of the actual conversation was . . . blatant hearsay." Based on that objection, the trial court permitted Stephen's and Lindsey's testimony at trial but ruled that neither party could ask about or probe "the specifics of the conversations." Steve then testified that when Irena was in seventh grade, she tearfully and reluctantly had told him "about things that had happened to her in the past," "refer[ing] to

her stepdad in that conversation." Lindsey apparently testified similarly, also without revealing specifically what Irena had told her.[6]

¶23 "We will not disturb the trial court's evidentiary rulings absent an abuse of discretion." *State v. Johnson*, 212 Ariz. 425, ¶ 25, 133 P.3d 735, 743 (2006). In a rather confusing argument, Marietta contends that, because the trial court "held that prior consistent testimony was not admissible, the testimony by Stephen and Lindsey was irrelevant." But, although the trial court ruled that neither Stephen nor Lindsey could specifically recount *what* Irena had said to them, it did not rule that the fact of Irena's prior consistent statement to her friends was inadmissible. Irena's testimony, to which Marietta did not object, apparently fit within Rule 801(d)(1)(B), Ariz. R. Evid., 17A A.R.S. Under that rule, "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence."

¶24 As the state points out and as Marietta acknowledges, the defense theory was that Chris's "reference to her [own] friend's sexual abuse prompted . . . Irena to fabricate her own sexual abuse, or, alternatively, that Detective Knuth's interview techniques caused Irena to falsely accuse [Marietta]." Thus, Irena's unchallenged testimony that she had

[6]Lindsey's videotaped testimony was presented during trial, but neither the videotape nor the transcript of that testimony is contained in the record on appeal.

disclosed the abuse to her friends arguably rebutted Marietta's allegations of recent fabrication or improper influence.

¶25 Although Marietta apparently suggests that allowing Stephen and Lindsey to testify that they had had a conversation with Irena somehow "violate[d] Rule 801(d)(1)(B)," ultimately, he argues only that their testimony was irrelevant. But, because Marietta did not object below to the friends' testimony based on either Rule 801(d)(1)(B) or relevancy grounds, he forfeited any such arguments absent prejudicial, fundamental error, which he does not argue on appeal. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *see also State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993) ("[A]n objection to the admission of evidence on one ground will not preserve issues relating to the admission of that evidence on other grounds."). And, in any event, testimony corroborating that Irena did in fact have a conversation with her friends concerning Marietta's actions is certainly relevant in a case that Marietta claims hinged solely on whether the jury found him or Irena more credible. *See* Ariz. R. Evid. 401, 17A A.R.S. (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). The trial court did not abuse its discretion in admitting the friends' limited testimony.

IV. Rehabilitating prospective jurors

¶26 Marietta next argues "[t]he trial judge improperly rehabilitated prospective jurors by asking leading questions." During voir dire, the trial court asked the prospective jury panel: "Have any of you been a victim of a crime or any close family members or friends?" In response to that question, the following exchanges took place:

> PROSPECTIVE JUROR [DOWNS]: I had a coworker, his daughter was molested by another family member. And only thing I know about that is his boss—he just came to me and needed some time off work. And that was it.
>
> THE COURT: Is that still pending?
>
> PROSPECTIVE JUROR: I don't know.
>
> THE COURT: Do you know the alleged victim in the case?
>
> PROSPECTIVE JUROR: No, I don't.
>
> THE COURT: And you do have very little information about the case, so I assume that would not have any bearing on this case?
>
> PROSPECTIVE JUROR: No, none.
>
> THE COURT: All right, Mr. Downs, thank you.
>
> . . . .
>
> PROSPECTIVE JUROR [CALVILLO]: My child's baby-sitter, her grandchildren were sexually molested by the father. But I don't know anything other than that. I just came home and never talked about it again.
>
> THE COURT: Was that person found guilty?

> PROSPECTIVE JUROR: It was through the military and the military took care of it. I don't know exactly what the outcome was.
>
> THE COURT: You weren't very involved in the matter or familiar with the facts. And that wouldn't affect you in this case?
>
> PROSPECTIVE JUROR: No, sir.
>
> THE COURT: Thank you.

The court continued its voir dire, eventually empaneling a jury that included Downs and Calvillo.

¶27 As the state points out, Marietta "contends for the first time on appeal that the trial court impermissibly attempted to rehabilitate two prospective jurors with leading questions." Because Marietta did not make this argument below, we review this claim only for prejudicial, fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08; *see also State v. Bible*, 175 Ariz. 549, 573, 858 P.2d 1152, 1176 (1993) (applying "stringent standard of fundamental error" to review of defendant's argument that trial court erroneously failed to sua sponte strike certain jurors for cause). Fundamental error is that which goes to the foundation of a case, depriving a defendant of an essential right or any possibility of a fair trial. *Bible*, 175 Ariz. at 572, 858 P.2d at 1175.

¶28 Because Marietta failed to "acknowledge that he has forfeited the present claim as to all but fundamental, prejudicial error—let alone attempt to show that such error occurred" in his opening brief, the state argues, "the claim is forfeited." *See Henderson*, 210

Ariz. 561, ¶ 20, 115 P.3d at 607-08. Even if Marietta's claim that the leading questions amounted to fundamental error, argued for the first time in his reply brief, preserves the issue for appeal, we find no error, let alone fundamental error.[7]

¶29 Citing only out-of-state cases, Marietta argues "[i]t is improper for the trial judge or any other person conducting voir dire to ask leading questions, because this obscures whether the prospective juror can lay aside his or her biases." But those cases presuppose a prospective juror's "demonstrated . . . prejudice or partial predisposition." *Griffin v. Commonwealth*, 454 S.E.2d 363, 366 (Va. Ct. App. 1995). Here, as the state points out, the two jurors stated only "that they knew someone who knew someone who had been molested," which did not indicate any "bias or partiality necessitating rehabilitation." *See State v. Martinez*, 196 Ariz. 451, ¶ 28, 999 P.2d 795, 803 (2000) (if juror fails to unequivocally demonstrate impartiality, trial court may sometimes "rehabilitate a challenged

[7]While arguing that the trial court's leading questions did amount to fundamental error, Marietta maintains that fundamental error review does not apply because "this claim is a description of the trial judge's bias that is alleged in Argument II," and as such, "the assertion of bias in his Rule 10.[1, Ariz. R. Crim. P., 16 A.R.S.,] motion was enough to preserve his objection to the bias displayed by the trial judge." But, in determining whether an issue is waived for the purposes of appeal, "[t]he essential question is whether or not the objectionable matter is brought to the attention of the trial court in a manner sufficient to advise the court that the error was not waived." *State v. Briggs*, 112 Ariz. 379, 382, 542 P.2d 804, 807 (1975). A motion to generally exclude the entire Pima County Superior Court bench did not alert the trial court that Marietta objected to the inclusion of these two jurors. Accordingly, his Rule 10.1 motion did not preserve the issue absent fundamental error.

juror" by asking "follow-up questions to assure the court that he [or she] can sit as a fair and impartial juror").

¶30 Even Marietta concedes that prospective jurors are asked "about their experience [with] crimes . . . because it indicates a *potential* bias." (Emphasis added.) But, because the two jurors did not exhibit any bias, and thus did not need to be rehabilitated, the trial court did not improperly rehabilitate them. Accordingly, the trial court did not err, fundamentally or otherwise, in questioning those jurors or retaining them on the jury panel. *See Martinez*, 196 Ariz. 451, ¶ 28, 999 P.2d at 803 (trial court is in best position to observe venire person's demeanor and judge answers to voir dire questions).

V. Other act evidence

¶31 Marietta next argues "[t]he trial court improperly admitted testimony concerning other acts." Before trial, the state moved pursuant to Rule 404(b) and (c), Ariz. R. Evid., 17A A.R.S., to admit other act evidence, including, inter alia, that Marietta had shown Irena "[a] dildo . . . with instructions . . . to use it on herself." Over Marietta's objection, during the status conference held a few days before trial, the trial court ruled that the evidence was admissible, finding its probative value of "explain[ing] and corroborat[ing] [Irena's] testimony" "outweigh[ed] any prejudice." "We review a trial court's admission of [uncharged sexual act] evidence for abuse of discretion." *State v. Garcia*, 200 Ariz. 471, ¶ 25, 28 P.3d 327, 331 (App. 2001).

¶32 Irena testified at trial that when she was ten or eleven, she and a friend had seen Marietta naked in his bedroom because he had left the door open. She further testified that Marietta had called her into the bedroom, had "show[n] [her] this dildo and [had] told [her] what it was and what it was used for." She testified that Marietta had told her that "if [she] ever wanted him to use it on [her], just to tell him."

¶33 Other act evidence is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). In a criminal sexual offense case, such evidence may be admitted "if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Ariz. R. Evid. 404(c). Although a trial court is required to make several findings before admitting other act evidence under Rule 404(c), on appeal, Marietta argues only that the aforementioned testimony was "more prejudicial than probative" under Rule 403, Ariz. R. Evid., 17A A.R.S., and that "the court must find that the evidence is admissible under Rule 403" before admitting it pursuant to Rule 404(b) and (c). Accordingly, we address only Marietta's claim that the aforementioned testimony "was more prejudicial than probative." A trial court is given "broad discretion in balancing probative value against prejudice," and we will not reverse its decision absent a clear abuse of discretion. *State v. Salazar*, 181 Ariz. 87, 91, 997 P.2d 617, 621 (App. 1994).

¶34 Specifically, Marietta claims that Irena's testimony concerning the sexual device "clearly prejudiced" him by "inflam[ing] the jury's emotions" despite its "little

probative value." He claims that the prejudice outweighed any probative value "because the dildo had never been found" and because the testimony "contribute[d] nothing" to resolving what he deems was the key issue in the case—"whether the jury found [Irena] or [him] more credible."

¶35 First, during the status conference, when Marietta made a similar argument about the unavailability of the device, the prosecutor explained that the device could not be introduced into evidence because Irena's mother "had divorced [Marietta] two years prior to [Irena's] allegations" and had "disposed of th[e] item" at the conclusion of the divorce proceeding. The state further argued that despite the lack of physical evidence, Irena's story was corroborated by her mother's testimony that the item had been in the home but "was hidden in such a way that [Irena] couldn't have found it unless one of the two adults had taken it from the place of concealment." Further, as the state points out on appeal, Marietta's "offering to use a sex device on Irena would have been equally probative even had he not show[n] her such a device." Thus, Marietta has not established that he was unfairly prejudiced because of the absence of the physical evidence.

¶36 Further, as the state points out, "Irena's testimony [was] highly probative of [Marietta's] sexual predisposition toward her." *See Garcia*, 200 Ariz. 471, ¶ 29, 28 P.3d at 332 ("[P]rior acts committed by a defendant against the *same victim* may be admitted to show the defendant's disposition toward that particular victim.") (emphasis added). Accordingly, we cannot say the trial court abused its discretion in allowing the testimony.

¶37 For the first time on appeal, Marietta also challenges Irena's testimony that one time after she had commented to Marietta that she needed to shave her legs, he had responded: "Yeah. You need to shave somewhere else too." He further argues the state did not disclose this other act before trial, as required by Rule 404(c)(3). But, as the state notes, Marietta has "forfeited both claims of error as to all but fundamental error that he must prove [was] prejudicial." *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607-08. And Marietta has not argued that admission of this other act evidence amounted to fundamental error. Accordingly, we reject this argument.

VI. *Portillo* instruction

¶38 Marietta lastly argues the trial court erred by giving the reasonable doubt instruction prescribed in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). Relying on a Hawaii case, he argues the *Portillo* instruction is unconstitutional and the trial court's giving it resulted in structural error. But, as Marietta acknowledges, our supreme court repeatedly has reaffirmed the use of the *Portillo* instruction. *See State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Finch*, 202 Ariz. 410, ¶ 18, 46 P.3d 421, 426 (2002); *State v. Van Adams*, 194 Ariz. 408, ¶ 30, 984 P.2d 16, 26 (1999). And, because neither this court nor a trial court can overrule, modify, or disregard controlling supreme court precedent, *see State v. Nieves*, 207 Ariz. 438, ¶ 29, 87 P.3d 851, 857 (App. 2004), we cannot find the trial court committed any error by instructing the jury on reasonable doubt pursuant to *Portillo*.

DISPOSITION

¶39 Marietta's convictions and sentences are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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GARYE L. VÁSQUEZ, Judge